



Commonwealth of Massachusetts State Ethics Commission

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PUBLIC ENFORCEMENT LETTER, 97-2

Dear Ms. DiPasquale:

As you know, the State Ethics Commission ("the Commission") has conducted a preliminary inquiry into allegations that you violated the state conflict of interest law, General Laws c. 268A, by participating as a member of the Somerville School Committee in matters in which your sister and daughter had financial interests. Based on the staff's inquiry (discussed below), the Commission voted on April 11, 1995, that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §§19 and 23(b)(3) and authorized adjudicatory proceedings. On June 6, 1995, the Commission staff issued an Order to Show Cause. You have answered that Order.

For the reasons discussed below, the Commission does not believe that further proceedings are warranted. Instead, the Commission has determined that the public interest would be better served by explaining its application of the law to the facts, with the expectation that this advice will ensure your understanding of and future compliance with the conflict of interest law. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no further formal action against you in this matter and have stipulated to the dismissal of the formal charges initiating the prior proceedings.

I. Facts

1. You were a member of the Somerville School Committee ("the School Committee") from 1984 through November 1995.

2. Julie Marie DiPasquale ("Julie") is your daughter and Eileen Bakey ("Bakey") is your sister.

I.

3. In October 1991, Eileen Bakey was a clerical employee of the Somerville School Department. She worked as a senior clerk-typist at Somerville High School.

4. In October 1991 a vacancy for a principal clerk-stenographer arose in the office of Assistant Superintendent William Fasciano, Somerville Public Schools. Shortly thereafter, the School Department posted a notice of clerical vacancy for the position, indicating that the position was to be filled provisionally pending a civil service examination.

5. Bakey applied for the principal clerk-stenographer vacancy. Several other qualified clerical employees also applied for the position.

6. A 1988 civil service list ("the 1988 list") had been established by the Department of Personnel Administration on October 28, 1988, pursuant to a June 11, 1988 promotional examination for principal clerk, Somerville public schools.

7. Seven clerical employees, ranked in order of their exam scores, were certified in the 1988 list as eligible for promotion to principal clerk. On December 5, 1988, the list was used to promote the third and sixth persons to principal clerk positions.

8. The first person on the 1988 list had retired in September 1991. Bakey was listed second. Thus, Bakey was effectively number one of the four persons remaining on the list.

9. Karen Cooke, a junior clerk-typist, was not on the 1988 list.

10. On November 18, 1991, the School Committee approved the provisional promotion of Cooke to the principal clerk-stenographer vacancy. The School Committee's vote was not implemented and Cooke was never assigned to the position.

11. On or about January 10, 1992, five School Department secretaries, including Bakey, filed appeals with the Civil Service Commission ("Civil Service"), challenging the non-use of the 1988 list to fill the principal clerk-stenographer vacancy and requesting an investigation into the employment practices of the School Department. Three of those five secretaries were from the ward that you represented.

12. On or about January 10, 1992, you learned that Bakey and your constituents had applied for the principal clerk-stenographer position and had filed complaints with Civil Service. At about the same time, you learned of the existence of the 1988 list on which Bakey's name appeared.

13. On January 22, 1992, the Rules Subcommittee of the School Committee voted on a motion/recommendation that the School Committee join with the five secretaries in their request that Civil Service conduct an immediate investigation into the School Department's hiring practice. You voted in favor of the motion. The motion was approved.

14. On January 27, 1992, the School Committee reviewed the Rules Subcommittee's recommendation and voted on a motion to request in writing a compliance review ("audit") by Civil Service into the hiring practices of the School Department. You voted in favor of the motion. The motion was approved.

15. In Spring 1992, a second principal clerk-stenographer position, in the Department of Curriculum and Instruction, became vacant.

16. On May 4, 1992, the School Committee voted on a motion to request the use of the 1988 list and to offer the two principal clerk-stenographer vacancies to Agnes McAnneny and Eileen Bakey.

17. You split your vote on the May 4, 1992 motion as follows: you voted in favor of the request to use the 1988 list, and voted "present" on offering the two vacancies to McAnneny and Bakey. The motion was approved.

18. Sometime prior to May 28, 1992, two additional principal clerk vacancies arose in the Lunch and Special Education Departments.

19. On May 28, 1992, the School Committee voted on a motion to have Assistant Superintendent Fasciano requisition Civil Service, by certified mail, to use the 1988 list to appoint four people from this list. You voted in favor of this motion. The motion was approved.

20. When you participated in each of the foregoing votes beginning on January 22, 1992, you knew that your sister was the highest ranked person on the 1988 list who was interested in obtaining a position as a principal clerk-stenographer in the School Department. The School Department was not obligated to appoint the highest ranked person on the list and had some history of by-passing such persons.

21. You yourself were a School Department clerical employee prior to your service on the School Committee. It has been your consistent position throughout your tenure on the School Committee that civil service law should be followed in hiring and promoting clerical employees.

22. In August 1992, Bakey accepted an appointment to the principal clerk-stenographer position in the office of Assistant Superintendent Fasciano.

23. The position paid about \$2,000 more than Bakey's position as senior clerk.

II.

24. Pursuant to the Somerville "School Committee Policy on Method of Hiring Teachers" applicable for the 1993-94 school year, teachers were selected from an eligibility list established annually.

25. The Teacher Eligibility List ranked candidates by score, with the highest possible score being 1,000 as follows: 500 possible points from the National Teacher Examination ("NTE"); 300 possible points from an interview with a three-member committee; and 200 possible points based on an applicant's training and experience.

26. Pursuant to the 1993-94 policy, a person's NTE score was good only from the current year or one of the two previous years.

27. Your daughter Julie was listed on four Teacher Eligibility Lists for the 1993-94 school year: K-3, 4-6, 7-8 and Choice. Julie was ranked seventh on the K-3 and 4-6 lists, second of two on the 7-8 list, and fourth on the Choice list.

28. On February 2, 1994, Julie requested that she be considered for a teaching position in Somerville for the 1994-95 school year.

29. Prior to March 1, 1994, you knew that your daughter was interested in becoming a Somerville school teacher, had been on the 1993-94 Teacher Eligibility Lists, had taken the NTE and was working as a substitute teacher in Somerville.

30. On March 1, 1994, the Personnel Subcommittee of the School Committee reviewed proposed changes to the School Committee's policy on calculating scores for the Teacher Eligibility List. You participated in that review and forwarded the Subcommittee's motion to the School Committee to accept the proposed changes.

31. The proposed changes were as follows:

- (a) Set up a mathematical deviation formula to adjust interview scores that are skewed.
- (b) Candidate will be listed in numerical order with the certification. This list will be inclusive of all elementary teachers.
- (c) Make sure that lists are established for all areas of secondary.
- (d) Re-state that NTE is good for five years. No NTE exam needed for vocational teachers.
- (e) Proposed eligibility lists will be inclusive in most secondary areas especially in SPED and Foreign language.
- (f) Principals in Somerville will be asked to rate substitute teachers annually to be added to their overall experience score. These teachers must have substituted at least three (3) quarters during the school year.
- (g) Long-term subs shall be appointed from the list of eligible teachers. If a permanent position should arise, anyone holding a long-term position will be considered as being on the list.

32. On March 7, 1994, the School Committee voted on a motion to adopt the proposed changes to the policy on calculating scores for the Teacher Eligibility List. You voted in favor of the motion.

33. According to the 1994-95 Teacher Eligibility Lists, Julie placed fifth on the Elementary (1-6) list.

34. On September 2, 1994, Principal Ellen O'Brien of the Healey School recommended to Anthony Caliri, Human Resources Manager, that Julie be offered the position of sixth grade teacher for the 1994-95 school year.

II. Discussion

As a member of the Somerville School Committee you were a municipal employee within the meaning of G.L. c. 268A, §1(g). As such, you are subject to the conflict of interest law, G.L. c. 268A, generally, and in particular, for the purposes of this discussion, to §19 and 23(b)(3) of the statute.

Section 19 of G.L. c. 268A prohibits a municipal employee from participating^{1/} as a municipal employee in a particular matter^{2/} in which to her knowledge she or an immediate family member has a financial interest.^{3/}

The controversy concerning the use of the 1988 civil service list to fill the principal clerk-stenographer vacancy in 1992 was a particular matter. You knew that your sister had a financial interest in this particular matter as an applicant for the vacancy. Nevertheless, you participated as a member of the School Committee in this particular matter on January 22, January 27, May 4 and May 28, 1992. Thus, there is reasonable cause to believe that you violated §19 on each of these occasions.

In addition, the Personnel Subcommittee's decision to propose and the School Committee's decision to approve changes to the teacher eligibility list were particular matters. You knew that your daughter had a financial interest in these particular matters as a teacher applicant.^{4/} Nevertheless, you participated as a member of the School Committee in this particular matter on March 1 and 7, 1994. Thus, there is reasonable cause to believe that you violated §19 on each of these occasions.

This same conduct also suggests a violation of G.L.c. 268A, §23(b)(3)'s prohibition against a public official knowingly or with reason to know, acting in a manner which would cause a reasonable person, with knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy her favor in the performance of her official duties. Your participation in matters affecting the financial interests of your sister and daughter would cause a reasonable person, with knowledge of the relevant circumstances, to conclude that you participated in these matters to benefit members of your own family and that you could be unduly influenced in the performance of your official responsibilities as a member of the School Committee. Thus, there is reasonable cause to believe that you violated §23(b)(3).

You have asserted that your split May 4, 1992 vote on the Bakey matter was an attempt to comply with the conflict of interest law as articulated and that your conduct in both matters falls within the general policy exemption to §19 and, by application of §23(d), is also exempt from §23(b)(3).^{5/} In Julie's case, you point specifically to the Education Reform Act of 1993, which removed school committees from hiring decisions and relegated them to policy matters, and which you argue coincides precisely with the general policy exemption.

The general policy exemption set forth in §19(b)(3) states that it shall not be a violation of §19

if the particular matter involves a determination of general policy and the interest of the municipal employee or members of his immediate family is shared with a substantial segment of the population of the municipality.

Section 19(b)(3) allows you to act as a school committee member on any determination of "general policy" which affects a substantial segment of your community's population in the same way. For example, you have a child in the public school system, and students currently get free milk at lunch, but because of budgetary concerns, the School Committee is considering charging a nominal fee for the milk. This plan would affect your financial interest because of your child, but it would also affect much of the town's population. Thus, you could participate in deciding on the proposal. Ethics Commission Brochure, *The Conflict of Interest Law and School Committee Members*.

You have stated that you participated in these particular matters because you believed them to involve matters of general policy, exempt under §19(b)(3). While you had a good faith belief that you could participate in these matters, the Commission disagrees with your interpretation of the law and takes this opportunity to educate

you and others as to its reasoning.

First, in the case of your 1992 participation, you assert that you participated in the particular matter to promote use of proper civil service procedure and not to benefit your sister. Second, in the case of your 1994 participation, you assert that you participated in the particular matter to effect amendments to the teacher eligibility lists, not to benefit your daughter.

Assuming that you were participating in particular matters involving determinations of general policy, the §19(b)(3) exemption would not apply unless your sister's and daughter's interests were shared with a substantial segment of the population of Somerville. Otherwise, a matter couched in terms of general policy might nevertheless affect the financial interests of only a few residents of the municipality. See *Belin v. Secretary of the Commonwealth*, 362 Mass. 530, 535 (1972).

The Commission has determined that 10% is a substantial segment of the population of the municipality for purposes of this exemption. *EC-COI-92-34*; *EC-COI-93-20*. Somerville's population was 72,303 in 1992 and 68,940 in 1994. In the case of your sister, only a handful of school department clerical employees, certainly less than 7,230, shared her interest. In the case of your daughter, only a handful of teacher applicants, certainly less than 6,894, shared her interest. Thus, your sister's and daughter's interests were not shared with a substantial segment of the Somerville population. *In re Khambaty*, 1987 SEC 318 (school committee member violated §19 by voting on matters in which school teacher wife had financial interest; §19(b)(3) did not apply because wife's interest not shared with substantial segment of community).

For the foregoing reasons, your conduct is not exempt from §19 by application of the general policy exemption.

III. Disposition

The Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to \$2,000 for each violation. The Commission chose to resolve this case with a public enforcement letter, rather than pursuing its formal order which might have resulted in a civil penalty because on a review of all the pertinent evidence it appeared that you were attempting to comply with the conflict of interest law by abstaining from matters specifically directed to your immediate family members, and because you believed in good faith that you could participate in particular matters involving determinations of general policy. Your cooperation with the Commission in fashioning this educational letter was also a consideration.

Based upon its review of this matter, the Commission has determined that your receipt of this public enforcement letter should be sufficient to ensure your understanding of and future compliance with the conflict of interest law.

This matter is now closed.

DATE: December 18, 1996

¹"Participate," means to participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

²"Particular matter," means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

³"Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. See *Graham v. McGrail*, 370 Mass. 133, 345 N.E. 2d 888 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. See *EC-COI-84-98*. The interest can be affected in either a positive or negative way. See *EC-COI-84-96*.

⁴Your daughter had a financial interest in these particular matters because the proposed changes resulted in your daughter's advancing a few places on the teacher eligibility list and her NTE score remaining valid for an additional two years.

⁵Section 23(d) provides that any "activity specifically exempted from any of the prohibitions in any other section of this chapter shall also be exempt from the provisions of this section."